that the parties to the contract, had they actually contemplated it, would probably have regarded it as so obviously terminating the obligation as not to require expression, failure of performance should be excused."

Another group of cases not usually discussed in connection with those above are the so-called "frustration of the adventure" cases. *Geipel* v. *Smith,* L. R., 7 Q. B. 404; *Jackson* v. *Union Marine Ins. Co.,* L. R., 10 C. P. 125; *Dahl* v. *Nelson,* 6 App. Cas. 38, are representative. In *Horlock* v. *Beal* (1916), 1 A. C. 486, the doctrine of these cases we find coalescing with that of the more familiar "impossibility" cases. See the interesting and valuable article on "War-time Impossibility of Performance of Contract" by Arnold D. McNair in 35 LAW Q. REV. 84.

Though, as seen above, the courts have shown a tendency to break in upon the rigid doctrine laid down in *Paradine* v. *Jane,* the process has not gone so far but that the decision of the United States Supreme Court in *The Columbus Power & Light Co.* v. *Columbus,* Adv. Ops., Apr. 14, 1919, is to be deemed in accord with the present law. In that case the Railway Company claimed to have been relieved of its contract obligation to furnish eight tickets for twenty-five cents by the action of the National War Labor Board in raising wages of the company's employees more than 50%, thereby increasing the operating expense of the line by about $560,000, and leaving the gross earnings of the company short of paying expenses, taxes, etc. Thoughtful people observing the recent tendency of the Government in handling wage problems may very naturally regret that the result in the case was not otherwise. That hard cases make bad law ,however, is all too familar.

R. W. A.

THE EFFECT OF A STRIKE UPON THE TIME OF PERFORMANCE OF A CONTRACT. —A makes a contract with B, whereby B agrees to repair A's ship. No time of performance is specified. Due to a peaceable strike in B's ship yards thirty-seven days more than would ordinarily be required are actually required by B in order to complete the repairs. Can A recover for the damages he has sustained through the delay?

This question was presented in the recent case of *Richland S. S. Co.* v. *Buffalo Dry Dock Co.,* (C. C. A. 1918), 254 Fed. 668. It was held (one judge dissenting) that A could not recover, because B had exercised due diligence in making the repairs, and "the question is simply whether the delay complained of was reasonable or unreasonable, not in view of the circumstances at the time the contract was made, but in view of the circumstances existing when the contract was being performed". One justice dissented on the ground that "what is a reasonable time must be determined by what the parties had in mind when the contract was made, and this must be judged by the circumstances which surrounded the parties at the time the contract was made, rather than by circumstances and conditions which subsequently arose".

It is clear that where the time of performance is specified, liability for a delay due to a strike can only be avoided, by an express exemption of liability therefor in the provisions of the contract. See BENJAMIN, SALES, 571; CAR-

VER, CARRIAGE BY SEA, Sec. 611; 4 LAWSON, RIGHTS & REMEDIES, Sec. 1823. But, as to whether a strike will excuse the delayed performance of a contract, which fails to stipulate the time of performance, the courts have expressed the same conflicting opinions, as are apparent in the two opinions in the principal case. The difficulty arises in defining a reasonable time. This difficulty has been avoided in many cases, where damages have been sought for a delay due to a peaceable strike, by attaching a liability to the contract, or on the theory that such a strike does not sever the relation of master and servant, and the employer is liable for the wrongful conduct of his servants. *Blackstock* v. *N. Y. & Erie R. R. Co.*, 20 N. Y. 48; *Read* v. *St. L., K. C. & N. R. R. Co.*, 60 Mo. 199, 207. But where the strike is accompanied with violence and intimidations, and the "strikers" prevent others, secured by the company to take their places, from performing, they can no longer be regarded as servants within this rule, and the carrier will not be responsible for a delay thereby occasioned. *Geismer* v. *L. S. & M. S. R. Co.*, 102 N. Y. 563, 571; *P. C. & St. L. R. W. Co.* v. *Hollowell*, 65 Ind. 188. In *P., Ft. W. & C. R. R. Co.* v. *Hazen*, 84 Ill. 36, the court, recognizing the distinction between a peaceable strike and one accompanied with violence, said: "For the delay resulting from the refusal of the employers of the company to do duty, the company is undoubtedly responsible. For delay resulting solely from the lawless violence of men not in the employment of the company, the company is not responsible, even though the men whose violence caused the delay had, but a short time before, been employed by the company". See also *Haas* v. *K. C., F. S. & G. R. R. Co.*, 81 Ga. 792, 795. Contra, *I. & G. N. Ry Co* v *Tisdale*, 74 Tex. 8. Such distinction is repudiated in the principal case. Since in the principal case, the delay was due to a peaceable strike, it would seem clear that a recovery of damages would have been allowed in many jurisdictions because of the employer's liability for the misconduct of his servants.

According to the minority opinion, circumstances might exist when the contract is made, which would warrant the implication that the contractor was merely required to exercise due diligence. Whether that alone were required would be a question of intention, to be gathered from the contract in the light of circumstances surrounding the parties when the contract was made. Thus, on the one hand, it might be said that in the case of loading or unloading a vessel, the contractor need merely exercise due diligence, *Hick* v. *Rodocanachi*, 65 L. T. R. (N. S.) 300 [1893], A. C. 22; *Empire Transp. Co.* v. *Philadelphia & R. Coal & Iron Co.*, 77 Fed. 919; *Cross* v. *Beard*, 26 N. Y. 85. On the other hand, something more than due diligence may be required, if the contract and the circumstances, existing when the contract was made, evince such an intention. In other words, a strike or any contingency would afford an excuse only if so contemplated by the parties. See *Eppens, Smith & Wiemann Co.* v. *Littlejohn*, 164 N. Y. 187; *Ellis* v. *Thompson*, 3 Mees. & W. 445, 448; *Cocker* v. *Franklin Manufacturing Co.*, 3 Sumn. 530. *Contra, Strange* v. *Wilson*, 17 Mich. 342. According to the majority opinion of the principal case, what the parties intended

would make no difference; the sole, essential inquiry would be merely whether or not there was negligence in performance. Since it is the fundamental purpose of the construction of a contract to give effect to the intention of the parties, it may be said that the minority opinion seems to propound the better view. The cases, above cited, indicate that it is supported by much authority.

It was also pointed out in the dissenting opinion of the principal case that the contractor knew of the "unsettled condition of labor and the prospect of a strike" at the time the contract was made, and failed to make any disclosure thereof to the owner of the ship. C. L. K.

THE DOMICIL OF PERSONS RESIDING ABROAD UNDER CONSULAR JURISDICTION. —The question of domicil under consular jurisdiction was discussed at some length by the present writer in an article which appeared in an earlier number of this review. See 17 MICH. LAW REV. 437-455. When that article was written some much quoted dicta and the decision of the Court of Appeal in *Casdagli* v. *Casdagli,* 87 L. J. P. 73, 79, indicated that according to the English rule a domicil of choice could not be acquired under consular jurisdiction. The author ventured to criticise that extraordinary rule from the point of view of the authorities and on principle. With regard to the authorities it was suggested that what appeared to be the English rule was the outcome of an obsolete theory of immiscibility, an imperfect analogy with commercial domicil in prize law, an equally imperfect analogy with the anomalous doctrine of Anglo-Indian domicil, and the accumulated dicta of distinguished judges. On principle it was urged that the rule involved an unnecessary confusion of domicil with *lex domicilii* and that the acquisition of domicil under consular jurisdiction should be governed by the same principles which control the acquisition of domicil elsewhere. The American case of *Mather* v. *Cunningham,* 105 Me. 326, and LORD JUSTICE SCRUTTON'S dissenting opinion in the *Casdagli Case* were commended as offering a more satisfactory solution of the problem from all points of view.

It is gratifying to learn that LORD JUSTICE SCRUTTON'S dissenting opinion has been approved unanimously in the House of Lords. *Casdagli* v. *Casdagli,* 88 L. J. P. 49. Every line of authority which could be thought to lend any support to the decision rendered by the majority in the Court of Appeal seems to have been reviewed exhaustively in the House of Lords, and in every instance the authority was found insufficient or beside the point. The doctrine of immiscibility, whatever significance in general it may retain at the present day, was eliminated from the problem presented by the case. LORD FINLAY said: "It has often been pointed out that there is a presumption against the acquisition by a British subject of a domicil in such countries as China and the Ottoman Dominions, owing to the difference of law, usages, and manners. Before special provision was made in the case of foreigners resident in such countries for the application to their property of their own law of succession, for their trial on criminal charges by Courts which will command their confidence, and for the settlement of disputes between them and others of the same nationality by such Courts, the presumption